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IN THE SUPREME COURT OF THE UNITED STATES

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COMPUCREDIT CORPORATION, ET AL., :

Petitioners : No. 10-948

v. :

WANDA GREENWOOD, ET AL. :

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Washington, D.C.

Tuesday, October 11, 2011

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:05 a.m.

APPEARANCES:

MICHAEL W. McCONNELL, ESQ., Washington, D.C.; on  
behalf of Petitioners.

SCOTT L. NELSON, ESQ., Washington, D.C.; on behalf of  
Respondents.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in case 10-948, CompuCredit Corporation v.  
5 Greenwood.

6 Mr. McConnell.

7 ORAL ARGUMENT OF MICHAEL W. McCONNELL

8 ON BEHALF OF THE PETITIONERS

9 MR. McCONNELL: Mr. Chief Justice, and may  
10 it please the Court:

11 This Court has consistently rejected the  
12 argument that Federal statutes that both create a right  
13 to sue and also bar waiver of rights under the statute  
14 are sufficiently explicit to override the strong Federal  
15 policy in favor of arbitrability expressed in the  
16 Federal Arbitration Act. In two of those cases, Gilmer  
17 and Piette, the Court construed a statute the relative  
18 language of which is virtually indistinguishable from  
19 that and the credit repair organization fact that we  
20 have before us today.

21 Those cases involve the ADEA. Both the ADEA  
22 and CROA, as I will call it, create a cause of action  
23 for aggrieved parties to bring actions for damages. And  
24 both statutes explicitly bar waiver of quote "any right  
25 under the statute."

1 JUSTICE SOTOMAYOR: Well, that statute  
2 didn't have as this one has a disclosure requirement  
3 that says you have a right to sue.

4 MR. McCONNELL: And that's the sole  
5 distinction between the two statutes.

6 JUSTICE SOTOMAYOR: Well, but it's a  
7 meaningful one.

8 MR. McCONNELL: So the -- first of all the  
9 disclosure statute is a -- describes in layman's terms,  
10 gives a quick description of an operative civil  
11 liability section which is set out in 1679(g) and which  
12 tells us exactly what Congress had in mind in creating a  
13 cause of action.

14 And when you look at the language of the  
15 actual operative provisions in (g), it's almost as if  
16 Congress deliberately went out of its way to use  
17 language that would not preclude arbitration. That  
18 language provides that a person who violates the statute  
19 shall be liable to the persons to whom --

20 JUSTICE KAGAN: Suppose it said something  
21 different, Mr. McConnell. Suppose the disclosure  
22 provision didn't exist at all but that instead of the  
23 liability provision you had a provision that simply  
24 said: any person injured by a violation of this act  
25 will have a right of action or will have a right to sue

1 under this statute. And then you had the waiver  
2 provision that you have in this statute. Is that  
3 enough?

4 MR. McCONNELL: Justice Kagan, I think that  
5 would be exactly the same. Because a cause of action  
6 and a right to sue are the same thing. They mean the  
7 same thing and this Court has consistently since  
8 Mitsubishi held that just because Congress creates a  
9 cause of action which is a right to sue does not  
10 preclude arbitration.

11 JUSTICE GINSBURG: Mr. McConnell, you  
12 started with the notion that the disclosure provision,  
13 the statute is meant to apply to ordinary people and if  
14 an ordinary person not schooled in the law read "you  
15 have a right to sue," wouldn't they understand that to  
16 mean: I have a right to sue in court?

17 MR. McCONNELL: Well, Justice Ginsburg, in  
18 the ADEA context, the government itself, the EEOC sends  
19 discriminated against workers a right-to-sue letter that  
20 tells them they have a right to sue. But this Court has  
21 twice said that does not preclude arbitration. And  
22 that's because a right to sue is simply a cause of  
23 action. It doesn't actually -- that doesn't mean that  
24 exclusively a right to be in court. It gives you rights  
25 which may be vindicated, and there are various ways in

1    which they can be vindicated.  And the Federal  
2    Arbitration Act provides that the -- that this Court or  
3    that the courts must enforce private contractual  
4    agreements that provide for the vindication, even of  
5    statutory rights through arbitration.

6                   JUSTICE ALITO:  Can you imagine any  
7    statutory language that would eliminate the right, the  
8    ability of the parties to enter into an arbitration  
9    agreement other than language that expressly prohibits  
10   the waiver of the right to sue in court in favor of  
11   arbitration?

12                  MR. McCONNELL:  Yes, Justice Alito, I can  
13   imagine it.  Now Congress has to date has not used it.  
14   Congress knows perfectly well how to bar arbitration.  
15   They have done it in a number of statutes.  In fact, in  
16   the very Congress that enacted CROA, there were three  
17   different statutes that were proposed that would have  
18   eliminated arbitration for particular statutory schemes.  
19   None of them were adopted.

20                  But Congress is perfectly aware of how to do  
21   this.  I don't think they have to use the magic words  
22   "no arbitration," but they certainly have to do  
23   something considerably more direct than this.

24                  Here they've created a statute that provides  
25   that there must be liability and creates a cause of

1 action, and then they tell people in a separate  
2 disclosure provision -- by the way, added very late in  
3 the drafting process, right -- simply to tell people  
4 that they have what is colloquially known for laymen as  
5 a right to sue.

6 Now, we lawyers call things causes of  
7 action. We call on things like the right to bring a  
8 civil action in a court of competent jurisdiction. That  
9 is lawyers' language. But when ordinary people talk  
10 about that, they think that's a right to sue. But a  
11 cause of action and a right to sue are exactly the same  
12 thing.

13 JUSTICE KAGAN: Mr. McConnell, the cases  
14 that you cite in support of your position rest on a  
15 distinction between procedural rights and substantive  
16 rights, which you invoke here. But where does that  
17 distinction itself come from? Because, it seems very  
18 atextual in nature, that distinction, which does appear  
19 in the cases. But when Congress talks about rights, why  
20 should we think of rights as limited to substantive  
21 rights rather than also procedural rights?

22 MR. McCONNELL: First of all, only our  
23 waiver argument depends upon those particular cases; we  
24 have a second argument. But nonetheless, I think this  
25 comes from the very long tradition, at least back to the

1 1980s in Mitsubishi, of understanding that arbitration  
2 is a choice of a forum, but it must vindicate the  
3 substantive rights of the particular statute.

4           So this is the way courts have talked about  
5 the relationship between arbitration and the substantive  
6 statute. So you look at the statute and you see what  
7 are the prohibitions, what are the substantive rights  
8 and so forth, and the arbitrators enforce all of those,  
9 but that the term rights does not include -- it does not  
10 mean that there is an exclusively judicial forum, just  
11 that whoever is the decisionmaker is going to enforce  
12 exactly the same set of substantive rights which are in  
13 the statute.

14           But Justice Kagan, even if that were not  
15 persuasive, Congress is perfectly aware that that's the  
16 way that this Court had been interpreting the words,  
17 because Gilmer, which interprets the very words "any  
18 rights" in an anti-waiver provision as not including  
19 arbitration, happened just a few years, 5 years, before  
20 enactment of this statute. And we know Congress was  
21 aware of Gilmer, because the very same Congress that  
22 passed CROA also considered a bill considered a bill,  
23 considered and rejected, a bill that would have reversed  
24 the decision in Gilmer.

25           So Gilmer and the very question of -- of



1 arbitration was before this Congress, and they knew that  
2 the word "any rights" was interpreted, interpreted by  
3 this Court, the way that it was in Gilmer, and they used  
4 precisely the language that was interpreted that way in  
5 Gilmer.

6 And so at this point there's a vocabulary.  
7 It's like there is a glossary, Congress is using it, and  
8 even if it may not be, you know, fully textual, as you  
9 say, that's -- that's the way Congress now addresses the  
10 matter.

11 JUSTICE GINSBURG: But the -- the act in  
12 Gilmer did not designate court action or right to sue as  
13 a right within the non-waivable provision.

14 MR. McCONNELL: That's true, Justice  
15 Ginsburg and the question is does it matter. I would  
16 say anyone looking at the ADEA's language, which says  
17 that an aggrieved person may bring a civil action in  
18 court, anyone would say that that is a right to sue. It  
19 is surely a right.

20 And indeed when this Court interpreted that  
21 statute in *Piette*, this Court called it a right -- a  
22 right to a judicial forum. Three times in the opinion,  
23 the Court refers to that as a "right." And the fact  
24 that our statute here refers to a right to sue, rather  
25 than a right to bring a civil action, seems -- certainly

1 against the backdrop -- recall, please, that the  
2 question here is whether Congress has explicitly  
3 abrogated the -- specifically disavowed, specifically  
4 barred the use -- the arbitrability of the -- of the  
5 contract, and that all doubts are supposed to be  
6 resolved in favor of arbitrability, and the -- the  
7 statutes must be interpreted with a healthy regard for  
8 the policy in favor of arbitrability.

9           Considering this, and considering the paltry  
10 basis in the text for -- for that conclusion, I don't  
11 see how the Ninth Circuit's decision can be withstood --  
12 could be upheld.

13           CHIEF JUSTICE ROBERTS: Do you think a --  
14 the word "lawsuit" typically describes an arbitration  
15 proceeding? If you're subject to an arbitration, would  
16 you say, I'm in a lawsuit?

17           MR. McCONNELL: I do not think so.

18           CHIEF JUSTICE ROBERTS: Well, why doesn't a  
19 right to sue refer to a lawsuit?

20           MR. McCONNELL: It refers to a cause of  
21 action, Your Honor, and we can call that a lawsuit, too.  
22 Often that's another layman's term for a cause of  
23 action, but this Court has held I don't know how many  
24 times, I believe it's at least six times since -- since  
25 Mitsubishi, that just because Congress creates a cause

1 of action and says that it will be in court, that does  
2 not mean that -- that that does not preclude  
3 arbitration, that that creates a cause of action.

4 And I think the -- the underlying logic of  
5 this is that the existence of a cause of action or of a  
6 right to sue, which I many suggest is a synonym for  
7 cause of action, is -- is not inconsistent with  
8 arbitration; it's the precondition for arbitration. If  
9 there were not a cause of action, there would be nothing  
10 to arbitrate, right? So in every case in which there is  
11 a legal arbitration, there is a cause of action. It  
12 might arise from contract, it might arise from a  
13 statute, but in every single arbitration there is a  
14 cause of action. If this Court were to interpret --

15 JUSTICE GINSBURG: You know, if this were  
16 written to be read by and understood by lawyers, I think  
17 you would have a stronger argument. But this is meant  
18 for consumers, and they read "You have a right to sue,  
19 and that right is not waivable. A right to sue, they  
20 are not going to think about cause of action. They  
21 don't know what cause of action is. But they do know  
22 that a right to sue is a right to bring a lawsuit.

23 MR. McCONNELL: Justice Ginsburg, again, if  
24 that is so, it would apply to other cases in which the  
25 language "right to sue" is used. For example, the

1 EEOC's right to sue letters, what could be more explicit  
2 than that? But this Court has held several times that  
3 just because the EEOC sends a right to sue letter  
4 doesn't mean that Congress --

5 JUSTICE GINSBURG: Is that in -- is that in  
6 the statute? Or is it just a colloquial --

7 MR. McCONNELL: It's in the regulations,  
8 Your Honor.

9 JUSTICE GINSBURG: Yes, but Title VII  
10 doesn't say "right to sue." It's a name that the agency  
11 uses, but it's not -- it's not in the statute. The  
12 statute doesn't say you have a right to sue.

13 MR. McCONNELL: Well, what the statute says  
14 is you may bring a suit in court. And so, if this  
15 Court -- I do not see how the Court can say that the  
16 right -- that the language "the right to sue" is  
17 different from a right of action.

18 It certainly -- it is the same thing.

19 CHIEF JUSTICE ROBERTS: One way you could do  
20 it is that the right to sue is more familiar  
21 colloquially. If somebody, you know, hits your car and  
22 you jump out angrily and you say -- you can say: I'm  
23 going to sue you. You are not likely to say: I'm going  
24 to bring a cause of action against you.

25 MR. McCONNELL: We have -- there is no

1 reason to think that when Congress appended a disclosure  
2 provision toward the end of the drafting of this statute  
3 and simply used a colloquial version of cause of action  
4 so that ordinary people would understand that they  
5 intended to change the meaning of the operative  
6 provision. The operative provision tells us, I think  
7 very clearly, what Congress meant, and then in this sort  
8 of quick shorthand, colloquial way, they are telling  
9 people, yes, they have an action, but just like they  
10 have an action -- persons have an action under the  
11 Sherman Act, they have an action under RICO, they have  
12 an action under the ADEA and they have an action under  
13 the Truth in Lending Act. In all of these cases people  
14 have a right to sue, but this Court has held that  
15 arbitration vindicates the cause of action.

16 JUSTICE KENNEDY: In the standard  
17 arbitration agreement, if Smith and Jones agree to  
18 arbitrate and Jones then brings suit in court, and that  
19 action is then stayed pending arbitration, has there  
20 been a breach of the arbitration agreement simply by  
21 bringing the suit?

22 MR. McCONNELL: I don't --

23 JUSTICE KENNEDY: I mean, doesn't that  
24 happen rather often?

25 MR. McCONNELL: It does happen rather often.

1 I'm not sure what the -- I would say no. What I would  
2 say is that the -- is that the question of arbitrability  
3 has been put before the court and the court will decide  
4 whether to enforce the arbitration clause or not.

5 JUSTICE KENNEDY: And of course the suits  
6 are brought after arbitration to enforce the arbitration  
7 award.

8 MR. McCONNELL: Exactly, Exactly. So in  
9 this sense, it's not that the cause of action goes away.  
10 It's not the -- the cause of action is not being waived.  
11 It's simply being vindicated in a different way, in a  
12 way which Congress in the Arbitration Act has told us is  
13 perfectly appropriate, just as appropriate as a -- as a  
14 vindication in Court, and that we should leave it to --  
15 and that the -- a contract between the parties to decide  
16 which of the forums for vindication of their rights  
17 would be used should be enforced.

18 JUSTICE GINSBURG: But this is not what the  
19 parties decide. These are take it or leave it  
20 contracts. So the consumer doesn't really elect  
21 arbitration. It's just presented as part of the terms  
22 that the consumer can take or leave and not negotiated.

23 MR. McCONNELL: That is an argument against  
24 arbitration that this Court has rejected several times.

25 JUSTICE GINSBURG: It's a question of

1 whether we take that into account in -- in determining  
2 what "You have a right to sue" means.

3 MR. McCONNELL: Well, Justice Ginsburg,  
4 Congress -- that's a policy question and Congress has  
5 given us an answer. Recently, by the way, Congress has  
6 indicated a slightly different answer which will affect  
7 cases like this in the future. As part of the  
8 Dodd-Frank regulatory reform bill, Congress required the  
9 new Consumer Financial Protection Bureau to conduct a  
10 serious study of the use of arbitration procedures in  
11 consumer financial matters to find out whether things  
12 like what you refer to, Justice Ginsburg -- the -- the  
13 types of contracts and so forth are fair to consumers.

14 So we'll get an authoritative answer to  
15 this, and Congress then vested this new bureau with  
16 authority either to outlaw arbitration awards or to  
17 require conditions or to reform them. But in the  
18 meantime, the policy that Congress has set is the policy  
19 in the Federal Arbitration Act, which is one of a -- a  
20 strong policy in favor of enforcing arbitration  
21 contracts.

22 JUSTICE KAGAN: Except if Congress indicates  
23 otherwise and --

24 MR. McCONNELL: Unless Congress has  
25 indicated otherwise.

1 JUSTICE KAGAN: And I guess the problem here  
2 is that there is this language in this disclosure  
3 provision which is meant, you know, truly to inform  
4 consumers about -- about their rights and about where  
5 they are going to end up resolving their disputes, and  
6 it says you have a right to sue, and you are asking us  
7 essentially to read that language as: You have a right  
8 to bring a claim in court, but it's probably going to  
9 end up in arbitration because of the nature of your form  
10 contract. And that seems a very different kind of  
11 statement to consumers.

12 MR. McCONNELL: Justice Kagan, I do not see  
13 how it would be any different from a consumer who reads  
14 any of the statutes that this Court has held are subject  
15 to arbitration. If, for example, in the Truth in  
16 Lending Act, which this Court interpreted in the Green  
17 Tree case that as part of the arbitration contract it  
18 was required to send the consumer a copy of the statute.  
19 The consumer would read in the statute that there is a  
20 cause of action, that they can bring suit in court to  
21 enforce their rights under the Truth in Lending Act.

22 They would read that statute and they would  
23 draw exactly the same conclusion that they do from the  
24 shorthand layman's language of "a right to sue." But  
25 again, even if that were so, I think as a matter of --



1 of how -- statutory interpretation, that a disclosure  
 2 provision cannot change the meaning of the operative  
 3 section. The operative section which creates the rights  
 4 and liabilities here is 1679g, and not even Respondents  
 5 seriously claim that that section is -- shows  
 6 congressional intent to prevent arbitrability. And that  
 7 seems -- the fact that there is a disclosure provision  
 8 that uses more informal language instead of the lawyers'  
 9 language used in 1679g does not change the meaning of  
 10 the statute.

11 Unless there are further questions, I will  
 12 reserve the remaining part of my time for rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
 14 Mr. Nelson.

15 ORAL ARGUMENT OF SCOTT L. NELSON

16 ON BEHALF OF THE RESPONDENTS

17 MR. NELSON: Mr. Chief Justice, and may it  
 18 please the Court:

19 The Credit Repair Organizations Act provides  
 20 consumers with what it explicitly denominates a right to  
 21 sue, and then it says that any right of the consumer  
 22 under the statute is non-waivable. As this Court has  
 23 said --

24 JUSTICE SOTOMAYOR: Does that mean that  
 25 there is a violation of the statute the minute one of

1 these organizations asks someone to sign an arbitration  
2 clause? A \$1,000 penalty for the mere asking?

3 MR. NELSON: There is -- there is a  
4 technical violation in asking, because in 1679f not only  
5 are waivers made unenforceable, but it is -- it is  
6 prohibited to ask someone to waive their rights.

7 However, that does not mean that you  
8 actually have a cause of action to go in and sue  
9 somebody for that, because, remember, under 1679g, what  
10 you can sue for is your money back. If somebody's asked  
11 you for a waiver and you didn't sign the contract and  
12 you didn't pay them any money -- or your damages;  
13 somebody asked you for a waiver and you never signed up  
14 with them, you don't have any damages; and then punitive  
15 damages in addition, which -- you know, the general rule  
16 about punitive damages is you get them on top of actual  
17 damages if you have actual damages.

18 So, yes, it's a technical violation. If a  
19 company engaged in a pattern or practice of it, the FTC  
20 could quite rightly go in and get an injunction against  
21 that. But it's not a case where there would be some  
22 onerous penalty imposed on a company merely for asking  
23 for a waiver.

24 JUSTICE SOTOMAYOR: Well, doesn't that  
25 reading, however, make suspect your claim that Congress

1 would have intended -- without any discussion in the  
2 legislative history -- and our case law has said you  
3 have to read the intent to bar arbitration both from the  
4 language of the statute, its context, and its history.  
5 I just don't see any history here that supports your  
6 reading.

7 MR. NELSON: Well, Justice Sotomayor, I want  
8 to take that in two parts, because the first was -- was  
9 tied to the -- the attempt to procure a waiver and  
10 whether that calls into question whether Congress really  
11 could have meant this. It's sort of an unusual  
12 provision to say not only can you not waive rights, but  
13 it's a violation even to ask somebody to waive them.

14 But that's no more unusual with respect to  
15 the right to sue than with respect to any other right  
16 under this statute. For example, the right to cancel  
17 after 3 days. Everybody would concede, I think, that  
18 that's a non-waivable right under the clear language of  
19 this statute. It's an unusual and perhaps onerous  
20 provision to say that if somebody just suggested that  
21 you waive that right to cancel and you never actually  
22 waived it, they still violated the statute.

23 But you know, that's what Congress wrote  
24 here, because in this statute, it was concerned with an  
25 industry that it saw as overreaching pervasively in

1 relation to the people that it was -- it was trying to  
2 sign up for its services. And that's why Congress  
3 wanted a very strong prohibition of waiver of rights  
4 that even attempted -- that even extended to attempt.

5 Now, as to the --

6 JUSTICE KAGAN: Well, Mr. Nelson, but your  
7 friend Mr. McConnell says quite rightly that the rules  
8 in this area have been fairly clear, that Congress knew  
9 it had to make especially clear that it wanted to void  
10 arbitration agreements. So if that's the case, why  
11 didn't Congress do what it has the done in a thousand  
12 other statutes -- or maybe that's an overstatement, but  
13 a number of other statutes -- which is to say so?

14 MR. NELSON: First of all, the rules -- the  
15 rules are not that Congress has to be especially clear  
16 in this context. And in fact, the Court has said over  
17 and over in the line of cases starting with Mitsubishi,  
18 McMahon, Rodriguez de Quijas and Gilmer that what has to  
19 be discernible -- and this also gets back to Justice  
20 Sotomayor's question -- it merely has to be discernible  
21 from the text or the legislative history or the  
22 structure and policies of the Act that -- that there's  
23 an intent to preclude waiver of the right to judicial  
24 remedies.

25 That's not an unmistakable plain statement

1 of rule; it's not a requirement of explicitness in the  
2 sense of explicitly using the term "arbitration." As  
3 even my friend stated, there is no requirement of magic  
4 words.

5 What this Court said, what it told Congress  
6 in the years leading up to this statute is, you have to  
7 express a discernible intent to preclude waiver of the  
8 right to judicial remedies.

9 JUSTICE SCALIA: Right. And -- and you  
10 don't need a magic word, but it seems to me you need  
11 something more than a provision dealing with what you  
12 have to tell to the people who -- who accept these  
13 contracts. I mean it's not in the substantive part of  
14 the statute. It's in the part of the statute that tells  
15 you what provisions of the -- of the act you have to  
16 notify the consumer of. It's a very strange way for  
17 Congress to say, "no arbitration." By putting this  
18 language in a section that has nothing to do with the  
19 rights under the act. It is intended to be a summary of  
20 the rights under the act.

21 MR. NELSON: Justice Scalia, I think it's  
22 not a strange way at all but a very direct way in the  
23 context here. Remember in Gilmer, what the Court was  
24 dealing with was a statute that as amended in an  
25 amendment that actually wasn't before the Court in

1 Gilmer said you can't waive any right under the statute.  
2 But that then raises the question, well, what do we mean  
3 by rights under this statute. And the Court concluded  
4 there and reinforced in Piette that it interpreted that  
5 to mean substantive rights. In the absence of a textual  
6 indication, that when Congress used the words "rights"  
7 in this statute it was intending to protect the  
8 procedural right to go to court.

9 Here we have something very different.  
10 Congress creates a cause of action which, as my friend  
11 says, colloquially someone could call that a right if  
12 they wanted to. But the cause of action says you can  
13 obtain this liability, the Court will determine that you  
14 obtain it through an action. That certainly gives you  
15 an entitlement to go to court. But Congress then goes  
16 further and it denominates that one of the rights under  
17 this statute, one of only two rights under this statute  
18 that are so-called.

19 JUSTICE SCALIA: Do you think Gilmer would  
20 have come out differently with regard to one of the  
21 procedural rights involved in that case if the statute  
22 had happened to refer to procedural right as a right?  
23 Procedural rights are rights, aren't they?

24 MR. NELSON: Yes, they are definitely  
25 rights, and --

1 JUSTICE SCALIA: And so if the statute in  
2 Gilmer had referred to one of the procedural rights in  
3 passing as a right, do you think that one would have  
4 been nonwaivable?

5 MR. NELSON: I think that if Congress had  
6 expressly denominated something in that statute as a  
7 right --

8 JUSTICE SCALIA: But procedural rights are  
9 rights. To denominate it as a right is --

10 MR. NELSON: Well, but the question is does  
11 any right refer to both procedural and substantive  
12 rights.

13 JUSTICE SCALIA: Exactly.

14 MR. NELSON: Which is what this Court held  
15 did not in Payette. When Congress -- you know, it does  
16 matter what words Congress uses and "rights" is a word  
17 that can have a lot of meanings. This is a statute --

18 JUSTICE SCALIA: But you're saying -- in  
19 answer to my question you're saying that just because  
20 the statute refers to procedural rights as rights, just  
21 as we do. All of a sudden, simply because the statute  
22 uses our normal language, procedural rights are elevated  
23 to the level of substantive rights and can't be waived.  
24 That can't be right.

25 MR. NELSON: I think if Congress makes clear

1 in the statute that what it means when it's talking  
2 about rights includes procedural rights and then it has  
3 a provision that says: any right under this statute is  
4 not subject to waiver, that creates a very strong  
5 inference that Congress meant what it said. But in  
6 fact --

7 JUSTICE SCALIA: You are effectively  
8 referring to a procedural right as a right creates any  
9 inference at all. It is a right.

10 MR. NELSON: It is a right, and when  
11 Congress has said -- I mean many of these statutes such  
12 as Title VII and FELA don't say that rights are  
13 nonwaiverable. This statute is a unique statute in its  
14 phrasing. It has a nonwaiver provision applicable to  
15 any right, and it has a list of rights. That's pretty  
16 unusual.

17 JUSTICE GINSBURG: What else is nonwaivable  
18 besides the three days to back out?

19 MR. NELSON: Well the other thing that this  
20 statute makes nonwaivable besides rights is protections,  
21 which is a phrase that hasn't been tied to anything  
22 defined in the statute. But I think that, for example,  
23 all of the prohibited practices listed in section  
24 1679(b) which are at pages 4A to 5A of the red brief,  
25 those would be nonwaivable. You couldn't waive your



1 right not to have the credit repair organization make  
2 false statements to you. You couldn't waive your right  
3 under 1679 b (B) not to have to make a payment in  
4 advance to a credit organization. You can't waive the  
5 right to the disclosures provided for in 1679(c) or the  
6 protection provided by those disclosures. And 1679(d)  
7 requires written contracts and specifies those terms.  
8 Those would all be subject to the provision in the  
9 statute that says you can't waive any protection or any  
10 right provided by the statute.

11 JUSTICE KAGAN: Do you know, Mr. Nelson,  
12 whether this statute is unique in this sense: Do you  
13 know of any other statute that arguably voids  
14 arbitration agreements without saying that they are  
15 voiding -- that it's voiding an arbitration agreement?

16 MR. NELSON: No. There's a -- sort of a  
17 pending disagreement, perhaps, over whether the Magnus  
18 and Moss Warranty Act does have some very specific  
19 language in that statute about informal dispute  
20 resolution mechanisms and the manner in which that has  
21 been interpreted in agency regulations. So this is  
22 really the only statute that I'm aware of that uses this  
23 formulation.

24 But you remind me of your earlier question  
25 which I never got to finish answering about the

1 thousands of other statutes that say specifically that  
2 you can't enforce arbitration agreements. In fact there  
3 are very few such statutes. There were none at the time  
4 this statute was enacted. The first one appeared six  
5 years later. The only time that there has been any  
6 number of them is in the 2010 Dodd-Frank Act which came  
7 after what I would say is a lengthy period of  
8 considerable attention that had been paid by advocates  
9 before Congress to the issue of arbitration that I think  
10 led to the desire to use as sort of a belt and  
11 suspenders approach in those statutes.

12 But what we have here in 1996 that had never  
13 before been a statute that prohibited the enforcement  
14 specifically of an arbitration agreement in those terms.  
15 And as Mr. McConnell said, there were some proposals,  
16 unenacted proposals that had been floated at that time.  
17 But I think the one thing that is clear is that we don't  
18 learn how Congress does things by looking at things that  
19 it didn't do. And that's all those unenacted proposals  
20 were.

21 JUSTICE GINSBURG: Would your position of  
22 right to a lawsuit, would that extend to a post-dispute  
23 genuinely bargained for right to arbitrate?

24 MR. NELSON: No, I think not, Justice  
25 Ginsburg, and for this reason: The Court has always

1 differentiated between post dispute settlements of  
2 claims and pre-dispute waivers, and has not considered  
3 agreements to settle, absent very special either  
4 statutory language such as in the ADEA which does apply  
5 a waiver provision to some types of settlements, and in  
6 the Fair Labor Standards Act where there's a very  
7 specific policy reason for prohibiting certain kinds of  
8 settlements. But generally the Court has not considered  
9 the settlement of a case to be a waiver of the right to  
10 bring a case. And that primarily came in the FELA cases  
11 that we cited in our briefs.

12 But I think it was significant that in Wilko  
13 v. Swan, where the Court said we are going to interpret  
14 the securities act not to allow waivers of the right to  
15 sue, the Court said of course this wouldn't apply to  
16 something that came post dispute. And in  
17 McMahon v. Rodriguez de Quijas, what the Court disagreed  
18 with WILKO v. Swan about was whether the right to sue  
19 under that particular statute was nonwaivable. But it  
20 favorably commented on the notion that of course, even  
21 if it were, it wouldn't bar a post dispute agreement to  
22 arbitrate a claim as a way of settling an actually  
23 pending dispute. And that's why I think that when  
24 Congress enacted this statute, it would have been acting  
25 against that backdrop and would not have -- no one would

1 have thought that a settlement agreement is a waiver of  
2 a right to sue. A settlement agreement is a resolution  
3 of the right to sue.

4 JUSTICE GINSBURG: Another argument that is  
5 made, and perhaps to your position, is that the statute  
6 says that any waiver of any protection or right may not  
7 be enforced by any court or any other person. And the  
8 suggestion is "any other person" must contemplate an  
9 alternate dispute method that doesn't involve court,  
10 court or any other person.

11 MR. NELSON: Well I don't think that it  
12 necessarily contemplates an alternative dispute  
13 mechanism, because I think, for example, that would  
14 bar -- when someone goes to court to compel arbitration,  
15 they are enforcing an arbitration agreement by bringing  
16 an enforcement action. So that would bar them from  
17 doing that.

18 So "any other person" doesn't necessarily  
19 mean arbitrators. But even to the extent that it  
20 comprehends arbitrators and maybe even one might have  
21 thought was principally applicable to them, you've got  
22 to realize that this statute, what it prohibits is only  
23 the waiver of the consumer's ability to arbitrate her  
24 CROA claim. It doesn't bar a credit repair organization  
25 from requiring a consumer to arbitrate the credit repair

1 organization's breach of contract action. And in fact,  
2 most -- well over 99 percent of the consumer  
3 arbitrations that were handled by the arbitration forum  
4 that was designated in this contract were collection  
5 actions brought by a company that says this consumer  
6 owes me some money.

7           So that's kind of the norm. That's the  
8 general run of arbitration cases. And if a credit  
9 repair organization were to initiate an arbitration  
10 against a consumer, that wouldn't violate the nonwaiver  
11 provision; but if the consumer then defended and said,  
12 wait a second, this contract is void because I never got  
13 the right to cancel, the provision would quite clearly  
14 prevent the arbitrator in that circumstance from saying,  
15 you waived the right to cancel.

16           CHIEF JUSTICE ROBERTS: What about the  
17 argument that the consumer retains the right to sue  
18 since they can go into court with their complaint, but  
19 it's simply the rule that the court will apply is that  
20 you have to proceed to arbitration?

21           MR. NELSON: Well, I think it's -- it would  
22 be a remarkably crabbed notion of having a right to sue  
23 that meant you could file a complaint that was  
24 mandatorily subject to decision elsewhere. And second,  
25 and this goes to Justice --

1 CHIEF JUSTICE ROBERTS: But that's  
2 frequently -- that's frequently the way these issues  
3 come up. I mean, people --

4 MR. NELSON: Certainly.

5 CHIEF JUSTICE ROBERTS: You cannot be forced  
6 to arbitrate either under the agreement or any other  
7 provision, they will bring their complaint in court, and  
8 then there will be a judicial resolution of whether or  
9 not the proceeding should go to arbitration.

10 MR. NELSON: But -- but all that has been  
11 resolved in that -- in that suit is not the plaintiff's  
12 claim under CROA, which is what he has a right to sue  
13 on, all that's resolved is the issue of whether he has a  
14 contractual obligation to arbitrate which he has  
15 breached by going into court.

16 And -- and this goes to Justice Kennedy's  
17 question. Under the FAA, you can compel arbitration  
18 when someone has filed a complaint that is in breach of  
19 an agreement to arbitrate.

20 So they -- they don't actually have a right  
21 to sue. You can't stop them from going and filing a  
22 complaint, but once they do, you come in and say, no,  
23 you have no right to -- to proceed on the merits with  
24 this claim in court. And in fact that's -- that's  
25 exactly what the arbitration --

1 JUSTICE KENNEDY: Can you -- can you get --  
2 can you get damages in the arbitration for the cost of  
3 attorney's fees to go to the court to say that you had  
4 to go to the arbitration?

5 MR. NELSON: No, I don't think you would  
6 generally have that entitlement under any -- any rule of  
7 law that is -- that is normally applicable in American  
8 courts. However, if your -- if your arbitration  
9 agreement provided for that, I'm afraid I can't point to  
10 any decision that would make it unenforceable, much as I  
11 would regret that result.

12 So, you know, I think in a -- in a real  
13 sense the consumer has no right to -- right to sue  
14 merely because they can run into court and -- and then  
15 be compelled to arbitrate. And that's exactly why this  
16 Court in every one of its decisions enforcing  
17 arbitration agreements, or not, has referred to the  
18 arbitration agreement as a waiver of the right to  
19 proceed judicially. It's used that phrase over and over  
20 again in McMahon, Rodriguez de Quijas, Mitsubishi, and  
21 -- and Gilmer itself.

22 The -- the common recognition of all those  
23 cases is that the arbitration agreement is a waiver of  
24 the person's right to proceed in court.

25 CHIEF JUSTICE ROBERTS: You agree, I take

1 it, that you would lose if the statute said "you have a  
2 cause of action"?

3 MR. NELSON: Yes. I -- you know, a cause of  
4 action I don't think would -- would do it for us. In  
5 fact, that's exactly what the ADEA says, the section  
6 that creates a judicial remedy is headed "Cause of  
7 Action." And so, you know, the question again is  
8 "right" is a word that -- that can be used in many  
9 senses. It's -- it's a word sort of like jurisdiction,  
10 it gets thrown around loosely. But when Congress says a  
11 right is non-waivable, it's referring to something  
12 specific, and the question is what is it referring to in  
13 a statute that uses the term "right" and uses it to  
14 describe the -- the ability to go to court.

15 And -- and again, that right to sue language  
16 is important in two ways, because it not only specifies  
17 that the 1679(g) remedies are a right for purpose of  
18 this statute, but it says something about the nature of  
19 the right. It's a right to sue. It's not just a right  
20 to get those damages, to get your money back. And sue,  
21 as -- as I -- I think my friend agrees --

22 JUSTICE SCALIA: Well -- well I guess it  
23 goes farther than that, your argument does, it seems to  
24 me. Your argument is the waiver, the non-waiver of  
25 rights provision would normally be read to mean



1 non-waiver of substantive rights, but the notice given  
2 to the consumer here which refers to the procedural  
3 right to sue as a "right" eliminates that presumption.

4 So I presume, therefore, that your position  
5 is that all procedural rights under this statute cannot  
6 be waived. Because, I mean, that's what we are talking  
7 about, what does right mean --

8 MR. NELSON: Justice Scalia --

9 JUSTICE SCALIA: -- when it says rights are  
10 not waived? And our prior case law says ordinarily that  
11 means only substantive rights; but here in this statute,  
12 it refers to the right to sue which is certainly is a  
13 procedural right as a right. So I presume all the other  
14 procedural rights in this statute likewise cannot be  
15 waived.

16 MR. NELSON: Well, I -- I'm not really sure  
17 there are other procedural rights in the statute.

18 JUSTICE SCALIA: Oh, there are -- none.

19 MR. NELSON: I mean, unless -- the right to  
20 cancel within 3 days I suppose could be called a  
21 procedure in one sense, although it's -- it's -- I think  
22 it -- it probably would -- would generally be  
23 categorized as a substantive right.

24 But as far as procedural rights of the  
25 consumer, they are set forth in 1679(g) and they are the

1 right to bring an action either on an individual or  
2 class basis for the damages and attorney fees specified  
3 in that section. And that's what I think is being  
4 referred to as the right to sue.

5 Now if there were something else in the  
6 statute that one might arguably call a right and  
7 arguably call procedural -- I mean, it's hypothetical  
8 because I don't think it's there -- but I -- I would not  
9 jump to the conclusion that it was a right if it was not  
10 comprehended by "right to sue." Because I think what  
11 that statement "right to sue" makes non-waivable is the  
12 right to sue. It's not just any procedural thing in  
13 this statute that one might loosely call a right.

14 JUSTICE KENNEDY: Suppose the case were  
15 reversed. The liability section says you have a right  
16 to sue, and the disclosure section says you have a right  
17 to sue and go to arbitration. What result then?

18 MR. NELSON: Well --

19 JUSTICE KENNEDY: It seems to me that under  
20 your -- well, I will let you answer.

21 MR. NELSON: Well, Justice Kennedy, let --  
22 let me divide it up. If the liability section said you  
23 had a right to sue and there were no disclosure --  
24 disclosure section at all, I would say that's -- that's  
25 plenty good enough. If -- if the disclosure section

1 says, you have a right to sue or to go to arbitration, I  
2 think you would have to then say sensibly what is  
3 Congress talking about when it's -- when it's referring  
4 to this, and you would have to read them together. And  
5 I would have a hard time standing up here and saying  
6 that a statute that told people "right to sue or  
7 arbitrate" meant right to sue only and foreclosed  
8 arbitration. And -- and, you know, I think -- I think  
9 that really would be a very different matter.

10 JUSTICE KAGAN: Mr. Nelson, you just said if  
11 the liability section said you have a right to sue  
12 that's okay, but if it says you have a cause of action  
13 that's not okay. But the right to sue is really just a  
14 colloquial way of expressing the first, so why should we  
15 draw the line between those two things?

16 MR. NELSON: Well, when you say  
17 "colloquial," I'm not -- I don't want to take offense  
18 with you, but I think that that's selling it a bit  
19 short. This -- this is a statute where Congress  
20 prescribed a notice, prescribed it in statutory terms,  
21 did it so people would have an understanding of what  
22 their rights were, and did it in a way that no  
23 reasonable consumer would understand meant oh, this  
24 non-waiverable right is not really to sue in the way  
25 that I would ordinarily understand the word, and even

1 that way that courts use it, but actually to -- to do  
2 something else.

3 So I -- I don't think it's colloquial in --  
4 in a disparaging sense. What it is, is something that  
5 is designed to convey a clear meaning, and the clear  
6 meaning that it conveys is that you have a right to go  
7 to court. Now, of course, even a disclosure that you  
8 have a right to go to court wouldn't be enough to get  
9 you over the hump if you didn't also have a provision  
10 that made that right non-waiverable. But again, here,  
11 what you have is both.

12 And -- and in doing that, in writing that  
13 statute, Congress was doing exactly what the Court had  
14 told it, it didn't do in Gilmer, it didn't do in  
15 McMahon, it didn't do in Mitsubishi. It created a right  
16 to a judicial remedy that is not subject to waiver.

17 Unless the Court has any further questions,  
18 I will --

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. McConnell, you have ten minutes  
21 remaining.

22 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

23 ON BEHALF OF THE PETITIONERS

24 JUSTICE SOTOMAYOR: Actually, Mr. McConnell,  
25 can we go to the issue of class action? If we buy your

1 argument that procedural and substantive rights are  
2 different, is it your position that you could seek a  
3 waiver of the class action even though this statute  
4 expressly contemplates class actions?

5 MR. McCONNELL: Actually, Justice Sotomayor,  
6 I think this statute specifically does not require -- it  
7 contemplates but does not require our -- class actions.  
8 If you look at -- at 1679b(a)(2)(B), which is the class  
9 action provision that is on page 59(a) of the appendix  
10 to the -- to the petition, all that it says is that in  
11 the case of a class action, here is how we would --  
12 here's how the damages, the punitive damages, would be  
13 calculated. It does not say that there must be class  
14 actions. It doesn't make that a non-waiverable right at  
15 all.

16 JUSTICE SOTOMAYOR: So your answer to me is  
17 that is waiverable. That is not a right contemplated by  
18 the right to sue.

19 MR. McCONNELL: Actually, my answer to you  
20 is that it's not a right to begin with --

21 JUSTICE SOTOMAYOR: You have to meet --

22 MR. McCONNELL: Whether waiverable or not.

23 JUSTICE SOTOMAYOR: But -- you have to meet  
24 the prerequisites of a class action before you are  
25 entitled to seek one. But your position is that's not a

1     protected right?

2                   MR. McCONNELL:   May I -- if we were to  
3     hypothesize that the statute did provide that there  
4     shall be class provisions, which this does not -- I  
5     think this statute is agnostic on that, but the  
6     hypothetical statute were class actions are  
7     contemplated, I would not argue that that is necessarily  
8     waiverable.  What I would argue is -- is that that could  
9     be vindicated through arbitration, that there can be, as  
10    this Court discussed just last term in Concepcion, there  
11    can be class arbitration proceedings --

12                  JUSTICE GINSBURG:  But you -- but this  
13    arbitration agreement precludes class action, doesn't  
14    it?

15                  MR. McCONNELL:  Yes, it does.  And again,  
16    this statute does not require that there be class  
17    proceedings, I am only addressing a hypothetical statute  
18    that did.

19                  JUSTICE SOTOMAYOR:  Unless -- unless we read  
20    the disclosure requirement of a right to sue to mean  
21    that you are entitled to bring your action in court,  
22    with whatever protections, procedural and substantive  
23    protections that entails.

24                  MR. McCONNELL:  Yes, and that seems to me  
25    just a further reason not to interpret a disclosure

1 provision with a layman's language as importing, you  
2 know, very specific legal notions. I think this simply  
3 means -- right to sue simply means cause of action. And  
4 it's -- each of the rights I should point out in the  
5 disclosure provision is -- has its actual textual home  
6 elsewhere. None of them are created in the disclosure  
7 provision. Each of them is created elsewhere, either in  
8 this statute or another. To find out exactly what they  
9 entail, you look to the substantive provisions. Here,  
10 you would look to 1679g, and you would see that class  
11 actions are possible, but not required under this  
12 particular statute.

13 CHIEF JUSTICE ROBERTS: Could you in an  
14 agreement waive the provisions of 1679g(b) that specify  
15 what a court shall consider in awarding punitive  
16 damages?

17 MR. McCONNELL: I don't think so,  
18 Mr. Chief Justice. Most lower courts create the right  
19 to punitive damages as a substantive right which would  
20 not be waivable.

21 CHIEF JUSTICE ROBERTS: Now, what -- what if  
22 you don't want your arbitrator to consider those four  
23 requirements? Could you waive particular aspects? I  
24 mean, that tells you that -- first of all, it says, of  
25 course, "the Court shall consider" but I take it your

1 position is when they say "the Court," they mean the  
2 Court or arbitrator?

3 MR. McCONNELL: It means the decisionmaker.  
4 Many statutes of course refer to things that courts  
5 might do, even though those statutes can be vindicated  
6 in arbitration. Title VII for example has several  
7 provisions in which it says if the Court determines  
8 this, then it may do that, for example, issuing  
9 injunctions and so forth. I -- when you import the  
10 substantive provisions of a statute into an arbitration  
11 proceeding, everything that would be substantively  
12 available from a court becomes available from the  
13 arbitrator, and that's the way I would read the punitive  
14 damages section here.

15 I note, by the way -- if I might just  
16 respond to a few of the points made by my friend in  
17 response to questions -- begin with Justice Sotomayor's  
18 interesting question about the fact that the statute  
19 appears to make even offering a waiver, offering an  
20 arbitration clause, a violation; it's actually even  
21 worse than that for two reasons.

22 One is that under their reading, a  
23 settlement is surely just as much a waiver as an  
24 arbitration is. Now, they say, well, oh, well, it only  
25 means post-dispute waivers, but that is not what this



1 statute says. This statute is about all waivers. In  
2 contrast to other statutes previously enacted, like the  
3 ADEA, which distinguish between pre-dispute and  
4 post-dispute waivers, this one does not. So their  
5 position suggests that even a settlement offer is a  
6 violation of this statute.

7 JUSTICE GINSBURG: Well, Mr. Nelson just  
8 said no, that his position does include that fact. And  
9 I asked him about post-dispute and he brought up  
10 settlement as well. He said that their interpretation  
11 does not exclude settlement, in which the Plaintiff  
12 agrees --

13 MR. McCONNELL: Well, Justice Ginsburg, that  
14 was his answer, but what that tells us is that he is he  
15 is not giving us a plain language meaning of the  
16 statute, which is all that they have. Their entire  
17 position is based upon a plain language reading of the  
18 statute. Remember the way the Ninth Circuit begins its  
19 opinion by quoting Alice in Wonderland. It's -- it's  
20 all about plain language, but they do not offer us a  
21 plain language interpretation of this statute. In order  
22 to avoid absurd consequences like making settlement  
23 offers a violation of the statute, they have to create  
24 exceptions, unspecified exceptions, to the text.

25 It would be much easier simply to follow the

1 rules of construction that this Court had announced  
2 before this statute was enacted, and against which  
3 Congress operated.

4 CHIEF JUSTICE ROBERTS: Well, one of those  
5 rules of construction is that you don't read statutes  
6 when -- to the extent they lead to absurd results. I  
7 think you can still say follow the plain language, but  
8 that doesn't mean you go so far as to say you can't  
9 enter into a settlement.

10 MR. McCONNELL: I think it's easier though  
11 simply to assume that Congress was using words in the  
12 way that this Court used them in *Gilmer* just a few years  
13 before, that that's a much more straightforward way of  
14 reading the statute.

15 JUSTICE SCALIA: I'm not sure that a  
16 settlement is a waiver anyway. It's a vindication. You  
17 vindicate your right to a settlement. I don't know that  
18 you waive it.

19 MR. McCONNELL: Just as I think you can say  
20 that when you go to arbitration, you vindicate the  
21 substantive rights of the statute as well, and indeed  
22 this Court has used that very language in *Mitsubishi*  
23 with respect to -- to arbitration.

24 The -- just a couple of other small points.

25 My friend points out that this is the first

1 statute in -- that at the time of this statute in 1996,  
2 that there had been no statute that explicitly barred  
3 arbitration, which is historically true but I think not  
4 particularly revealing. It was only in '85 in  
5 Mitsubishi and then '91 in Gilmer that Congress became  
6 aware that it needed to do this in statutory causes of  
7 action. And in -- by 1996, they were considering bills  
8 that explicitly avoided arbitration clauses. They  
9 weren't enacted, but this is for political reasons.  
10 Remember the political composition of Congress in 1996.

11 It is not surprising that statutes voiding  
12 arbitration agreements become more common when the  
13 political composition of the Congress changes. This is  
14 fundamentally a political choice, and ought to be -- we  
15 ought to respect the choices that Congress has made.

16 Unless there are further questions, I will  
17 waive the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. McCONNELL: Unless it's an un-waivable  
20 right.

21 CHIEF JUSTICE ROBERTS: You have no right to  
22 time before the Court.

23 Thank you, counsel. The case is submitted.

24 (Whereupon, at 12:00 p.m., the case in the  
25 above-entitled matter was submitted.)

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